

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

Complaint of Personal Assistance
Services Council

Docket No. C2010-1

Personal Assistance Services Council (“PASC”) respectfully submits this Complaint against United States Postal Service (“Postal Service”) and alleges the following:

1. This Complaint challenges the Postal Service’s decision to deny PASC’s application to send mail at Nonprofit Standard Mail rates (“Nonprofit Rates”). The Postal Service violated 39 U.S.C. §§ 3626 and 403(c) when it denied PASC’s application on the grounds that it is a government entity that receives taxpayer funds.

2. PASC respectfully requests that the Postal Regulatory Commission (“Commission”) (i) promptly hold hearings on this Complaint, and (ii) issue an order directing the Postal Service follow its own regulations and grant PASC authorization to send mail at Nonprofit Rates based on the record of those hearings. PASC also reserves its right to propose additional forms of relief.

3. The Commission has jurisdiction pursuant to 39 U.S.C. §§ 3662 and 39 C.F.R. §§ 3030 and 3031.

4. During all times mentioned, PASC was and remains a government agency organized under the laws of the State of California and local ordinances with its principal office and place of business in Los Angeles County (“the County”). PASC is currently located on 4730 Woodman Ave. Suite 405, Sherman Oaks, California 91423-2440.

5. The Postal Service is an independent establishment of the executive branch of the government of the United States, which by an Act of Congress, 84 Stat. 722 (39 U.S.C. § 401) may be sued in its official name.

6. Notice and communications about this matter should be sent to:

John K. Ly
JONES DAY
555 S. Flower St. 50th Fl.
Los Angeles, California 90072
(213) 243-2331

FACTUAL BACKGROUND

The Domestic Mailing Manual

7. The Postal Service is an independent executive branch agency to which Congress has delegated policy-making authority regarding, among other things, mail classifications and rates. The Commission, which is part of the Postal Service, prescribes postal rates for the country and these rates are promulgated and published in the Domestic Mailing Manual (the “Manual”).

8. As pertinent to this case, the Manual creates a special (and lower) postal rate category, called Nonprofit Rates, for organizations that meet the Manual’s qualifications for such Rates and wish to send “standard mail” (which is a class of service below “first class” mail). In particular, Section 703.1.2 of the Manual reads:

Qualified Nonprofit Organizations

1.2.1 General.

An organization described in 1.2.3 through 1.2.10 may be authorized to mail at the Nonprofit Standard Mail rates if it is not organized for profit and none of its net income inures to the benefit of any private stockholder or individual.

. . .

1.2.6 Philanthropic (Charitable)

A philanthropic (charitable) organization is a nonprofit organization organized and operated to benefit the public. Examples include those that are organized to relieve the poor, distressed, or underprivileged; . . . to lessen the burdens of government; or to promote social welfare for any of the above purposes That an organization organized and operated to relieve indigent persons may receive voluntary contributions from those persons does not necessarily make it ineligible for Nonprofit Standard Mail rates as a philanthropic organization. . . .

9. The Manual excludes several “[i]neligible organizations.” However, the Manual explicitly does not exclude governmental entities that are “*separate and distinct governmental organizations*” organized and operated for the purpose of *any one* of the qualifying, nonprofit categories. Section 703.1.4.2 of the Manual reads:

State, county, and municipal governments are generally not eligible for the Nonprofit Standard Mail rates. However, a separate and distinct state, county, or municipal governmental organization that meets the criteria for any one of the specific categories in [§ 703.1.2] may be eligible, notwithstanding its governmental status.

10. Sections 703.1.2 and 703.1.4.2 of the Manual, read together, require the Postal Service to provide Nonprofit Rates to any “separate and distinct governmental organization” that is “organized and operated to benefit the public”—a narrow category that, as described below, includes PASC.

In-Home Supportive Services

11. PASC is a public authority established by the Los Angeles County Board of Supervisors in 1997 as “an entity separate from the county” to improve, enhance, and support the State of California’s In-Home Supportive Services (“IHSS”). Many low-income and elderly individuals and persons with disabilities need assistance to remain in their homes rather than being in nursing homes or other custodial care facilities. In general, in-home care can consist of critical, life-sustaining services such as assistance with feeding, bathing, bowel and bladder

care functions, moving to or from a wheelchair or bed, medications, and paramedical care that includes injections, wound care, ventilator care, tube feeding, and catheter care.

12. The IHSS program funds in-home care services for low-income individuals who, due to advanced age or disability, would not otherwise be able to remain safely in their homes, and would instead be placed in nursing homes or other institutional settings.

13. The IHSS program is funded by a combination of federal, state, and County resources, and serves approximately 172,000 individuals who receive in-home supportive services (“Recipients”) within the County.

14. The IHSS program operates as follows:

a. Prospective IHSS recipients apply to the County for inclusion in the program, and County social workers determine, on an individual basis, whether the applicant’s needs, income, and asset level qualify the applicant for inclusion. For the successful applicants, County social workers evaluate and decide the number and nature of monthly service hours that are to be authorized, based upon the minimum services needed by the Recipient to be able to remain in his or her home.

b. Recipients are then responsible themselves for hiring one or more workers (“Providers”) to perform the authorized IHSS services, and are solely responsible for scheduling services; assigning duties; directing and supervising the work; evaluating performance; and terminating the Provider as they see fit. In this respect, Recipients are the employers of the Providers.

c. The Providers must submit their timesheets to the Recipient for review and approval, and then to the County for review and processing before the State Controller issues checks (warrants) to the Providers for their IHSS services.

PASC

15. PASC is not part of the IHSS, but rather it is “an entity separate from the county” to improve, enhance, and support IHSS services. PASC is not organized for profit and none of its funding inures to the benefit of any private stockholder or individual.

16. Although created by the County and funded by a combination of federal, state and local money, PASC operates in a manner similar to other philanthropic organizations. For example:

a. None of the members of the PASC Governing Board (“the Board”) are permitted to be employees of the County or of PASC. Rather, the Board is solely comprised of volunteers, at least fifty percent (50%) of whom are required to be “current or past users of personal services paid for through public and private funds,” as required by the California Welfare and Institutions Code.

b. PASC’s staff of 25 are not employees of the County, the State of California, or the United States.

c. PASC’s actions do not impose any liability or add any additional obligations to the County.

d. PASC’s primary purpose is to enhance the existing IHSS program, a wholly philanthropic purpose.

17. As a service to Recipients and Providers, PASC operates the largest IHSS registry (“the Registry”). The Registry does the following:

a. The Registry identifies existing and potential Providers and provides them with important information on IHSS. The Registry also collects job history and referral information on the Providers, requires the Providers to pass a mandatory criminal background investigation, and processes information regarding Providers’ times and areas of current availability.

b. The Registry also processes information, including a statement of particular needs and preferences, from Recipients who are interested in using the Registry.

c. The Registry then “matches” Recipients and potential Providers, and furnishes each Recipient with a personalized short list of potentially suitable Providers. The Registry thus enables Recipients to make more informed decisions regarding their hiring of Providers. In addition, the Registry facilitates not only the Recipient’s access to the best possible Provider, but enhances the job search of the participating Providers. Participation in the Registry is strictly voluntary on the part of both Recipients and Providers.

18. PASC also provides a host of other services to its Recipients that include the following:

a. Through its Registry operations, PASC also offers a Back-up Attendant Program to serve the needs of Recipients, who would be most at risk because of the severity of their disabilities or their advanced age if their regular attendant (and those they normally rely upon for back-up care) is unavailable because of illness, family emergency or are otherwise unable to provide scheduled services. This program refers Providers (who have been pre-cleared in terms of skill levels and willingness to serve on short notice) to the Recipients who are in need of a substitute Provider.

b. PASC operates an information and referral program for Recipients who are in need of information concerning affordable housing programs, and access to assistive technology services such as wheelchairs and voice-activated computers.

19. To enhance the quality and quantity of Providers, PASC also gives Providers the following services:

a. PASC covers approximately 28,000 qualified Providers with healthcare insurance coverage through Los Angeles County's Health Maintenance Organization. This healthcare plan encourages Providers to remain employed within the program, which may enhance the number of qualified and experienced Providers by providing employment stability.

b. Although Recipients and Providers determine most aspects of their employment relationship, PASC serves as the "employer of record" for collective bargaining purposes with the union that represents the Providers. This employer function is quite limited in scope, given the primary employer authority of the Recipients; the collective bargaining contract is thus limited to setting the hourly wage rate and the health benefits plan terms for the Providers, and does not purport to regulate in any way the in-home authority of the Recipients to control all other aspects of the employment of the Providers.

20. PASC periodically mails brochures, bulletins and other materials (collectively to be referred to as "important information") to Recipients and various community, senior, and disability organizations. This important information serves to better inform Recipients and the public regarding the IHSS program and PASC's services, such as PASC's Registry and training programs. To reach these people and properly perform its functions within its very limited budget resources, PASC must find and utilize a cost-effective method of communication. Because the IHSS population generally does not have e-mail access, mail is the only effective means of reaching most Recipients. And, because of the large number of Recipients (172,000) in Los Angeles County, Nonprofit Rates provide the only feasible method for PASC to more fully perform its philanthropic functions with regard to the Recipient community.

**PASC's Application for Nonprofit Mailing Rates, and the Postal Service's
Repeated Rejection of that Application**

21. On the basis of the plain language in the Manual, PASC, on March 13, 2007, applied to the Postal Service to send its standard mail at Nonprofit Rates (the “Application”). In its Application, PASC marked the boxes indicating it was organized and operated primarily for philanthropic purposes, and that it was not a “for-profit organization.” PASC also provided documentation in support of those representations. As noted in paragraph 15, PASC is also “an entity separate from the county.”

22. Notwithstanding that the plain terms of the Manual required that PASC's Application be granted, the Postal Service denied the Application. In a letter dated April 12, 2007, the Postal Service asserted two rationales for denying PASC's Application. First, the Postal Service stated that PASC was ineligible because PASC is a governmental agency. However, the Postal Service did not address the Manual's exception for “separate and distinct governmental entities.” Second, the Postal Service asserted that government organizations like PASC are “normally not eligible under the philanthropic category because their income is generally not derived primarily from voluntary contributions or donations.” This purported basis for denial—which looks to the source of the philanthropic organization's funding—appears nowhere in the Manual.

23. One of the many rationales asserted by the Postal Service to justify its decision to deny the Application is based on an interpretive guideline, Publication 417, which does not have the force of law. If taken at face value, the Postal Service's “no-taxpayer-funding” guideline would prohibit *any* governmental entity—even one that is “separate and distinct” and serves a philanthropic purpose—from qualifying for Nonprofit Rates, and would thereby nullify the express provision of the Manual entitling such entities to those rates.

24. In a letter dated April 24, 2007, PASC timely appealed the Postal Service's decision ("PASC's Appeal") and explained why the Postal Service's logic contravened the plain language of the Manual.

25. The Postal Service nevertheless rejected PASC's Appeal in a letter dated May 31, 2007, serving as its final agency decision ("Final Agency Decision"). In that Final Agency Decision, the Postal Service conceded that PASC "serves eleemosynary purposes," and simply reiterated its initial position that PASC is categorically ineligible because it is funded by "public funds."

26. In a letter dated June 27, 2007, PASC requested that the Postal Service reconsider its decision to reject PASC's appeal. The Postal Service responded on July 10, 2007, reaffirming its decision.

27. As a result of the Final Agency Decision, PASC has exhausted all of its administrative remedies provided under the Manual, as well as all other applicable statutes, and now seeks resolution from the Commission.

The Impact of the Postal Service's Wrongful Denial on PASC

28. The Postal Service's denial of PASC's Application has caused PASC to pay standard mailing rates for its mailings or, in many instances, to substantially limit the scope of important mailings. The primary result of not having the mailing rates sought here has been PASC's inability to carry out fully its important philanthropic goals of enhancing the IHSS program to the extent needed in the County.

29. As a result of the Postal Service's denial, PASC along with its Recipients have sustained great and irreparable injury. PASC cannot fully advance the public interest and provide comprehensive informative mailings regarding services vital to approximately 172,000 Recipients.

30. PASC, along with its Recipients, cannot be fully compensated in damages and are without an adequate remedy at law because the exact amount of

damage PASC (and those who needs its services) will sustain will be difficult to determine.

31. As a further result of the Postal Service's denial, PASC has sustained damage and suffered hardship. If PASC is not allowed to mail at Nonprofit Rates, PASC will be further damaged in an amount to be alleged when additional damages have been determined.

The Impact of the Postal Service's Wrongful Denial on Other Separate and Distinct Governmental Organizations

32. PASC falls within the very small set of separate and distinct governmental entities perform vital services for the communities they serve, including disabled and elderly individuals who desperately need care.

33. The Postal Service's denial of the Application impacts other separate and distinct governmental entities that perform philanthropic activities and receive at least some funds from taxpayers are similarly affected by the issues involved in this Complaint.

34. As more state and local governments curtail spending, separate and distinct organizations such as PASC depend on the savings from Nonprofit Rates to reach individuals that need their help.

Nature of the Evidence that PASC Has or Expects to Obtain During Discovery to Support the Facts Alleged in the Complaint

35. PASC intends to support paragraphs 11-32 with documentary evidence possessed by PASC and with potential testimony from PASC employees.

36. PASC expects to seek additional evidence in the following categories from the Postal Service in discovery:

a. Documents related to government and quasi-governmental entitles similarly situated to PASC that the Postal Service authorized to send mail at Nonprofit Rates.

b. Documents related to or support the Postal Service's decision to deny PASC's application and the further rejection of PASC's application in subsequent appeals and request for reconsideration.

37. The additional evidence referenced in paragraph 33 are documents that are in the sole possession of the Postal Service.

38. PASC reserves its rights to seek additional discovery.

Related Proceedings

39. None of the issues raised in this Complaint are pending in or have been resolved by an existing Commission proceeding or a proceeding in any other forum in which PASC is a party. On July 29, 2008, PASC filed a complaint against Postal Service in United States District Court for the Central District for the claims alleged here. However, in light of the new federal regulations, PASC voluntarily dismissed the case without prejudice so that it could seek relief before the Commission.

Certification Regarding Attempts to Meet and Confer to Resolve or Settlement Complaint

40. As stated in paragraphs 21-27, PASC requested that the Postal Service reverse or reconsider its decision to deny PASC's application to send mail at Nonprofit Rates.

41. PASC sent the Postal Service a draft copy of this Complaint on September 17, 2009. The Postal Service indicated that it had received the Complaint, but it has not contacted us regarding settlement.

42. In light of our attempts to unsuccessful attempts to resolve this matter with the Postal Service, PASC believes that additional steps to settle the matter would be inadequate and futile.

COUNT I.
Declaratory Relief

43. PASC incorporates by reference the allegations in paragraphs 1 through 40 above as though fully set forth herein.

44. An actual controversy has arisen and now exists between PASC and the Postal Service regarding PASC's application to send standard mail at Nonprofit Rates. The Postal Service states that PASC is not entitled to send mail materials at Nonprofit Rates even though it is a separate and distinct government entity organized and operated with a philanthropic primary purpose. PASC disputes the Postal Service's interpretation of the Manual.

45. The Postal Service, by and through its agents, has failed to enforce its own regulations concerning Nonprofit Rate authorization. The Final Agency Decision that denied PASC's application to send mail at Nonprofit Rates was unlawful.

46. As a result of these disputes, a justiciable controversy exists between PASC and the Postal Service.

47. PASC seeks a judicial determination by the Commission that the Postal Service grant PASC's application to send standard mail at Nonprofit Rates effective as of the date of this Complaint.

COUNT II.
Violation of 39 U.S.C. § 403(c)

48. PASC incorporates by reference the allegations in paragraphs 1 through 44 above as though fully set forth herein.

49. As alleged above, the Postal Service's regulations permit separate and distinct governmental entities that otherwise fall into an eligible category to qualify for Nonprofit Rates. These regulations do not draw any distinction between (or show any preference for) governmental entities that primarily receive funds from

“voluntary contributions or donations” versus taxpayer-funded governmental entities.

50. By denying PASC’s Application for Nonprofit Rates, when PASC is admittedly a separate and distinct governmental entity fulfilling a philanthropic function, the Postal Service violated its own regulations and therefore unduly and unreasonably discriminated against PASC.

51. Upon information and belief, the Postal Service would also at times follow its regulations and allow other taxpayer-funded governmental entities to receive Nonprofit Rates, thereby making the Postal Service’s discrimination against PASC even more arbitrary, irrational and discriminatory.

DEMAND FOR RELIEF

WHEREFORE, PASC prays that this Commission enter judgment in its favor on each and every claim for relief set forth above and award it relief including, but not limited to, the following:

1. For hearings on this Complaint;
2. For a declaration that PASC is entitled to mail standard mail at Nonprofit Rates;
3. For an order directing the Postal Service to follow its own regulations and permit PASC, a separate and distinct governmental organization, to send standard mail at Nonprofit Rates as set forth in the Manual; and
4. For such other and further relief as the Commission may deem proper.

Dated: December 4, 2009

JON

By:

John Ly

Attorneys for Plaintiff
PERSONAL ASSISTANCE SERVICES
COUNCIL